

STATE OF MICHIGAN
COURT OF APPEALS

MARK LACEY and HEIDI LACEY,

Plaintiffs-Appellants,

v

STEVEN P. KLEGMAN, D.O. and GRAND
TRAVERSE RADIOLOGISTS, P.C.,

Defendants-Appellees.

UNPUBLISHED

April 14, 2011

No. 296182

Grand Traverse Circuit Court

LC No. 2008-026805-NH

Before: GLEICHER, P.J., and SAWYER and MARKEY, JJ.

PER CURIAM.

Plaintiffs appeal by delayed leave granted the trial court's order granting defendants' motion for summary disposition after finding that plaintiffs' defective notice of intent (NOI) did not toll the period of limitations. We reverse and remand for further proceedings.

On October 7, 2005, plaintiffs sent a notice of intent to file a malpractice action to defendants. On April 6, 2006, plaintiffs filed their complaint, accompanied by affidavits of merit. Defendants moved for summary disposition, asserting that the affidavits of merit were deficient because they did not include an adequate theory of proximate causation. The trial court granted the motion and dismissed the complaint in a March 21, 2007, order. Plaintiffs appealed to this Court, and defendants cross-appealed. This Court affirmed the trial court's finding that the affidavits of merit did not comply with MCL 600.2912d(1) because they did not specify the manner in which the breach of the standard of care was the proximate cause of the injury. However, this Court remanded the matter for entry of an order granting summary disposition without prejudice, citing *Kirkaldy v Rim*, 478 Mich 581; 734 NW2d 201 (2007).¹

Plaintiffs filed a second complaint with new affidavits of merit on September 22, 2008. Defendants moved for summary disposition, asserting that the proximate cause portion of the NOI was deficient, and thus the notice did not toll the statute of limitations. The trial court heard

¹ *Lacey v Klegman*, unpublished opinion per curiam of the Court of Appeals, issued June 17, 2008 (Docket No. 277774).

argument on the motion on January 21, 2009, and granted the motion in an order entered February 3, 2009. The court stated on the record that plaintiffs' NOI was defective because it did not identify the manner in which the alleged breach was the proximate cause of the injury, although defendants had not articulated any real prejudice. According to existing case law, a defective NOI did not toll the period of limitations, and so plaintiffs' suit was not timely. Because the period of limitations would be expired if the NOI did not toll it, the trial court's dismissal effectively was with prejudice.

Plaintiffs filed their delayed application for leave to appeal on January 27, 2010, arguing that *Bush v Shabahang*, 484 Mich 156; 722 NW2d 272 (2009), overruled the case law relied on by the trial court. This Court granted leave on May 6, 2010.

In this Court, plaintiffs argue that *Bush* applies to their case and that, under *Bush*, the period of limitations is tolled despite the presence of defects in the NOI plaintiffs filed. Thus, if plaintiffs' NOI is defective and the suit dismissed, it should be dismissed without prejudice with time remaining in the period of limitations because the suit was tolled. *Bush* also held that if no substantial right of the defendant is implicated and the plaintiff made a good faith effort to comply with the NOI requirements, then the plaintiff should be allowed to amend the NOI. Plaintiffs assert that because defendants by now are fully aware of the nature of the claim against them, and they failed to raise the issue of the defective NOI in their initial motion for summary disposition, plaintiffs should be allowed to amend their NOI.

We review de novo a trial court's decision to grant or deny a motion for summary disposition. *Spiek v Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998). Statutory interpretation is a question of law that we also consider de novo on appeal. *Detroit v Ambassador Bridge Co*, 481 Mich 29, 35; 748 NW2d 221 (2008).

We conclude plaintiffs' argument regarding *Bush* has merit. The *Bush* Court held that under the 2004 amendments to MCL 600.5856, a defect in a timely mailed NOI does not prevent the tolling of the statute of limitations. *Bush*, 484 Mich at 161, 185. When a party makes a good-faith attempt to comply with the content requirements of MCL 600.2912b, defects in the NOI may be cured in accord with MCL 600.2301 when the substantial rights of the parties are not affected. *Bush*, 484 Mich at 161, 177. The Court found that its prior decisions in *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57; 642 NW2d 663 (2002), and *Boodt v Borgess Med Ctr*, 481 Mich 558; 751 NW2d 44 (2008), which held otherwise, were both foundationally premised on language that preceded the 2004 amendments. *Bush*, 484 Mich at 165. Only when a plaintiff has not made a good faith effort to comply with MCL 600.2912b(4) should a trial court consider dismissal of an action without prejudice. *Bush*, 484 Mich at 178. Here, MCL 600.5856(c) as interpreted in *Bush* applies because plaintiffs' NOI and their original complaint were filed after the April 22, 2004 effective date of 2004 PA 87. *Bush*, 484 Mich at 160, 185.

Defendants' contrary arguments are unpersuasive. The length of and reasons for plaintiffs' delay in filing this application do not affect the applicability of the statute, as interpreted by our Supreme Court. While plaintiffs' appeal was not under direct review at the time *Bush* was decided, it was still properly subject to review under MCR 7.205(F).

The cases relied on by defendants, *Kidder v Ptacin*, 284 Mich App 166; 771 NW2d 806 (2009), and *Farley v Carp*, 287 Mich App 1; 782 NW2d 508 (2010), are distinguishable. In those cases, the appellate process had already concluded and this Court had issued decisions that were unfavorable to the plaintiffs, or no appeal had been taken from a final order. The plaintiffs could not obtain further review by filing a motion for relief from judgment in the trial court. Here, plaintiffs' case had not concluded because they were still within the time limit to seek direct review of the trial court's decision through a delayed application for leave to appeal. Defendants' argument that this would allow cases no finality fails. MCR 7.205(F) limits the time plaintiffs can seek review to one year after the final judgment.

Finally, defendants' argument that plaintiffs did not make a timely effort to cure the defective NOI after the previous remand also fails. The trial court recognized that by the time defendants filed their motion, plaintiffs' theory of proximate causation had become clear. Where defendants were aware of plaintiffs' theory of proximate causation, they were not prejudiced by the deficiency in the NOI. Until the Supreme Court issued the decision in *Bush*, plaintiffs did not have reason to know that an amendment to the notice of intent would be required or allowed. Plaintiffs appear to have made a good-faith effort to comply with the NOI requirements, and they should be allowed to amend the NOI without dismissal.

We reverse and remand for further proceedings consistent with this opinion. We do not retain jurisdiction. As the prevailing parties, plaintiffs may tax costs pursuant to MCR 7.219.

/s/ Elizabeth L. Gleicher
/s/ David H. Sawyer
/s/ Jane E. Markey